

**BEFORE**

**THE PUBLIC SERVICE COMMISSION OF**

**SOUTH CAROLINA**

**DOCKET NO. 2017-381-A**

**In Re: The Impact of the Tax Cuts and Jobs )**  
**Act on South Carolina Utilities )**  
**)**

**DAUFUSKIE ISLAND UTILITY COMPANY, INC.'S SUPPLEMENTAL  
 FILING IN LIEU OF PRESENTING ORAL ARGUMENT ON OCTOBER 11, 2018**

Daufuskie Island Utility Company, Inc. ("DIUC") previously appeared in this matter and responded to the Motion to Preserve Tax Benefits for Ratepayers filed by the Office of Regulatory Staff ("ORS") on April 6, 2018. In summary, DIUC maintains:

1. The Commission should have opened a contested docket before considering ORS's Motion to Preserve Tax Benefits.
2. There is no statutory basis for the refunds sought by ORS's Motion to Preserve Tax Benefits.
3. The relief requested by ORS's Motion to Preserve Tax Benefits is an unconstitutional taking.
4. ORS's Motion to Preserve Tax Benefits asks the Commission to engage in impermissible retroactive ratemaking.

*See* DIUC Response to ORS Motion to Preserve Tax Benefits for Ratepayers, filed April 16, 2018.

Further, in support of its position, DIUC adopts, as if restated herein on behalf of DIUC, the entirety of the Responses to the ORS Motion filed by both Palmetto Utilities, Inc. ("PUT") and Palmetto Wastewater Reclamation, LLC ("PWR") on April 16, 2016. The Responses explain:

Based on a number of incorrect assumptions, the Motion seeks to have the Commission impermissibly set rates based on a change in a single expense, engage in improper retroactive ratemaking, ignore statutory procedures governing the Commission's ability to reduce public utility rates, deny utilities both procedural and substantive due process, and effect an impermissible taking of private property for private use.

Responses at 1. DIUC also joins in the Joint Petition for Rehearing or Reconsideration of Order No. 2018-308 filed in this Docket by PUI and PWR on May 14, 2018, as well as in all oral argument presented by counsel for PUI and PWI during any hearing on the Joint Petition.

By way of additional support, DIUC relies upon *Pet. of Elizabethtown Water Co.*, 527 A.2d 354, 357–58 (N.J. 1987), which provides a succinct analysis of retroactive ratemaking and why it is not a proper function of regulatory bodies like this Commission; in fact, as the case explains, the Commission as a body with delegated power from the Legislature is not authorized to impose retroactive rates.

In *Elizabethtown*, the Supreme Court of New Jersey found that the Board of Public Utilities (“BPU”) improperly ordered Elizabethtown Water Company to postpone the effective date of a rate increase to offset the utility’s overearnings from prior years (1982-1983) because that order constituted retroactive ratesetting. The court flatly rejected BPU’s position that deferring implementation of a new rate increase prospectively to create an offset in collections was not retroactive rate setting. IN doing so, the court explained that the change proposed by BPU to address the past overcollection was, in fact, retroactive ratemaking and it would not actually benefit the ratepayers burdened by the overpayment. *Id.*

In this case, retroactive ratemaking would be unfair to both the public and the company. Although Rate Counsel characterizes the BPU's action as benefitting ratepayers, it is more accurate to say that it benefits some ratepayers at the expense of others. Because people are continually moving into and out of the company's service area, not all of the people who purchased water in 1982 and 1983 will receive a refund and not all people who would benefit from lower rates were overcharged. Moreover, ratepayers who have lived in the service area since 1982

are not necessarily purchasing as much water now as they did in 1982 and 1983. For these reasons, the amount saved by a customer through reduced rates does not necessarily bear any relation to the amount by which that customer was “overcharged” in 1982 and 1983. In effect, those ratepayers who do not receive the entire amounts they were “overcharged” are subsidizing other ratepayers.

*Pet. of Elizabethtown Water Co.*, 527 A.2d 354, 362 (N.J. 1987). So, as ORS does here, the New Jersey BPU argued that addressing a “refund” or changing a lawfully set rate by applying the benefit to a future set of utility ratepayers does not treat the “overcharged” ratepayers fairly, as they have subsidized the benefit later arriving ratepayers will receive.

Also, it is well settled that utility ratemaking is a legislative function that is often, as in South Carolina, delegated to a state agency or commission. Pursuant to S. C. Code § 58-5-210, the Public Service Commission is vested with the power “to supervise and regulate the rates and service of every public utility in this State” and “to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State.” Furthermore, pursuant to S.C. Code § 58-5-290, if the Commission finds, “after hearing, that utility’s rates are “unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any,” the Commission “may determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be thereafter observed and enforced and shall fix them by order as herein provided.” As the language of these statutes indicate and as other court have held, utility ratemaking is a legislative and not a judicial function. *See In re C. R. Co. of N. J.*, 327 A.2d 427, 432 (N.J. 1974).

Likewise in South Carolina, the language of the vesting statute and the legislative nature of the very duty the statute vests in the Commission clearly demonstrate that the Commission’s ratemaking authority may be exercised only prospectively. *See also Pet. of Elizabethtown Water*

*Co.*, 527 A.2d 354, 360 (N.J. 1987) (holding “Therefore, not only the specific language of the statute, but also its legislative nature, discloses that the BPU's general ratemaking authority may be exercised only prospectively.”) (citations omitted). “By its nature legislative action [and therefore ratemaking as a legislative action vested in a ratemaking commission] operates prospectively and not retroactively.” *Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n of West Virginia*, 300 S.E.2d 607, 619 (W.Va.1982) (emphasis added); *see also Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150, 158 (1908) (Justice Holmes explaining “Legislation ... looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future....”)

WHEREFORE, DIUC respectfully requests that the Commission reconsider its ruling in Order 2018-308 and reject ORS’s recommendations which gave rise to same. DIUC requests the Commission find that **all** effects of the Tax Act on DIUC’s allowable expenses and revenues may be determined only in the context of a rate relief proceeding during which all revenues and expenses are to be considered in setting a just and reasonable rate. To rule otherwise would be to reaffirm Order 2018-308’s retroactive ratemaking, which is not the function of or within the authority of this Commission, having been vested only with the prospective legislative authority delegated to the Commission by the South Carolina General Assembly.

Respectfully submitted,

/s/ Thomas P. Gressette, Jr.

**Thomas P. Gressette, Jr.**

Direct: (843)-727-2249

Email: Gressette@WGFLAW.com

**G. Trenholm Walker**

Direct: (843)-727-2208

Email: Walker@WGFLAW.com

**WALKER GRESSETTE FREEMAN & LINTON, LLC**

Mail: PO Box 22167, Charleston, SC 29413

Office: 66 Hasell Street, Charleston, SC 29401

Phone: 843-727-2200

October 10, 2018  
Charleston, South Carolina

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2017-381-A**

**In Re: The Impact of the Tax Cuts and Jobs )**  
**Act on South Carolina Utilities )**  
**)**

This is to certify that I have caused to be served this day a copy of **DAUFUSKIE ISLAND UTILITY COMPANY, INC.’S SUPPLEMENTAL FILING IN LIEU OF PRESENTING ORAL ARGUMENT ON OCTOBER 11, 2018**, via email as processed through the Commission’s electronic document management system and via first class mail, postage pre-paid, to the persons named below at the addresses set forth below:

Counsel for ORS  
Jeffrey M. Nelson, Esq.  
Jenny R. Pittman, Esq.  
Office of Regulatory Staff  
1401 Main Street, Suite 900  
Columbia, SC, 29201

/s/ Thomas P. Gressette, Jr.  
**Thomas P. Gressette, Jr.**

October 10, 2018  
Charleston, South Carolina